Appendix

EXHIBIT A

No. 5366

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY (a corporation),
Plaintiff in Error,

vs.

MILLIE R. JONES,
Defendant in Error.

CERTIFIED COPY OF BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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Filed May 18, 1928.
Paul P. O'Brien, Clerk.

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Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

This is an action at law, tried without a jury, and special findings, upon which the judgment is based, were given and made by the Court.

The action is brought by the plaintiff, defendant in error, against the defendant, plaintiff in error, upon a certain indemnity bond executed by the defendant to Reservation Land and Cattle Company and Elizabeth A. Rodgers and Millie R. Jones, as their interests may appear, called in the bond, "Employer", for the purpose of protecting, according to the conditions of the bond, the employer from any acts of fraud, dishonesty or wrongful misapplication of money on the part of Walter W. Akers, called in the bond, "Employee".

Elizabeth A. Rodgers did not appear in the action and Millie R. Jones is the sole defendant in error and we shall hereafter refer to the plaintiff in error, Maryland Casualty Company, as "defendant", and Millie R. Jones, the defendant in error, as "plaintiff".

The bond is set forth in full on pages 125-128 of the Transcript and was executed on the 23rd day of August, 1923.

The giving of this bond arose out of an application therefor made by Akers and his employer, Reservation Land and Cattle Company, and the cause of the giving of the bond grew out of the fact that on or about the 22nd day of August, 1923, the plaintiff and Akers entered into a certain written agreement, consisting of three parts, which is set forth in full on pages 88-108 of the Transcript.

By Part One of the agreement, the plaintiff leased certain real and personal property, consisting of a ranch, with its appurtenances, in Nevada, to Akers for the term of three years and five months at a monthly rental of $2,750, commencing July 1st, 1923, upon various conditions contained in Part One, one of which conditions was that Akers was not to dispose of certain neat cattle described in this agreement and consisting of approximately 746 head and that these cattle were at all times to remain upon the ranch rented by Akers.

Many explicit conditions are set out upon which Akers was to conduct the ranch and manage the personal property thereon and he was to remove personal property therefrom only upon certain specific conditions and was to pay his rent strictly according to the terms of Part One above mentioned.

By Part Two of this agreement, Akers was to be permitted upon certain conditions to buy the ranch property.

This was never done and Part Two cuts no figure in the case.

By Part Three of the agreement it is provided that Akers shall have the right to form a corporation in which he is to be a stockholder and director and to assign all his interest in the agreement in its entirety to this corporation provided that the corporation shall be a party to the assignment "and thereby assume the performance of all and singular the terms, covenants, promises and conditions of this agreement".

With the execution of the agreement, it is provided in Part Three thereof that Akers shall give a bond to the plaintiff in the sum of $25,000. to hold plaintiff harmless against all disbursements and applications of money or property by Akers, otherwise than strictly as required in the agreement, and that said Akers shall be the principal upon said bond and be bound, as such, as well as manager of the corporation assignee.

After the agreement had been duly executed, a corporation named the Reservation Land and Cattle Company was formed on September 1st, 1923, and with the consent of the plaintiff the entire agreement was assigned to the corporation by Akers on the 17th day of September, 1923. (Tr. p. 169.)

At the time of the formation of the corporation Akers held only one share of its capital stock but in November, 1923, all of the capital stock of the corporation was delivered to Akers as the owner thereof. (Tr. p. 170.)

Akers failed to pay his rent, according to the terms of the agreement, beginning his default on January 1, 1924, and no rent was thereafter paid by him, and on the 18th day of June, 1924, Akers and the Reservation Land and Cattle Company, hereinafter called the "corporation",

surrendered the possession of the ranch to the plaintiff. (Tr. p. 14.)

Thereafter plaintiff commenced this action, alleging that Akers had wrongfully misapplied the sum of approximately $32,000, of funds received by him from the ranch and consisting in part of wrongful sales made by him of cattle as forbidden by Part One of his agreement.

The case was finally referred to a Commissioner and Referee to take testimony and judgment was entered against the defendant in the full sum of the bond, to wit, $25,000.

The defenses to the action briefly enumerated are as follows:

(1) The plaintiff was not an employer of Akers and is not entitled to recover upon the bond as such employer;

(2) If plaintiff were an employer of Akers, she has not complied with the terms of the bond requiring notice of her discovery of the misapplication of money by Akers;

(3) If plaintiff were the employer of Akers, she has not complied with the warranties set out in the application for the bond shown on pages 157-166 of the transcript, "employer's statement";

(4) The defendant is not liable upon the bond for the reason that, without defendant's knowledge, Akers was changed from the status of an employee of the corporation to being the corporation itself, in that, in November, 1923, he became the owner of all its capital stock;

(5) There is no competent evidence to show that Akers misapplied moneys as found by the Court upon the report of the Referee.

SPECIFICATIONS OF ERROR.

The defendant makes the following specifications of error in support of its petition and writ issued thereon:

1. The Court erred in finding that plaintiff is entitled to recover upon the bond as an employer therein mentioned;

2. The Court erred in finding that plaintiff complied with the terms of the bond and the application upon which it was given;

3. The Court erred in finding that the employer's statement was fulfilled by plaintiff according to its terms;

4. The Court erred in finding that defendant ever had any knowledge of the original agreement between plaintiff and Akers until more than one year after this agreement was made;

5. The Court erred in finding that the words contained in the bond "as their interest may appear" had any application to plaintiff after the incorporation of the "Reservation Land and Cattle Company";

6. The Court erred in finding that notice of misapplication of funds by Akers was given to defendant by plaintiff according to the terms of the bond;

7. The Court erred in rendering judgment against defendant for the reason that the evidence affirmatively shows that Akers was permitted by plaintiff to perform

the terms of the lease agreement after Akers had made a breach of said agreement upon his part and with the full knowledge of plaintiff and without any knowledge of the defendant;

8. The evidence is insufficient to support the judgment that Akers had misapplied money as shown by the judgment.

POINT I.

PLAINTIFF WAS NOT AN EMPLOYER OF AKERS AND IS NOT ENTITLED TO RECOVER UPON THE BOND AS SUCH EMPLOYER.

As above mentioned, the bond was given to the Reservation Land and Cattle Company, the plaintiff and Rodgers, as "employer", *as their interest may appear*. (Tr. p. 125.)

At the time the bond was given, the corporation had not been formed, and as far as the evidence shows, it was understood between Akers and the plaintiff that the corporation would be the employer of Akers after it had been formed. (Tr. p. 106.)

But as the bond was given sometime before the actual incorporation, the plaintiff and Rodgers, as the actual owners of the ranch which was to be leased to the corporation, were named in the bond to protect them until the formation of the corporation.

Consequently, the words "as their interests may appear" are in the bond as well as in the application therefor.

But as soon as the corporation was formed and the assignment had been made, *with plaintiff's consent*, by Akers to the corporation, then the interest of plaintiff

and Rodgers, as an employer, disappeared and the sole employer of Akers became and was thereafter the Reservation Land and Cattle Company.

But Akers did not begin to default in his promises until January 1, 1924, and no notice of misapplication of money was ever given by anyone to defendant until July 1, 1924. (Tr. p. 171.)

It appears, then, that from September, 1923 until Akers began to default, and at all times thereafter, the Reservation Land and Cattle Company was the sole employer of Akers, and, as such, has and had the sole right to sue upon this bond.

There is not a word in the evidence to show that the plaintiff *ever attempted to exercise any control over Akers* but that, on the contrary, by the very terms of the agreement between them, Akers was authorized and permitted to form this corporation and to take to himself its entire capital stock, and to this end in the application for the bond, and in the employer's statement, *the corporation is always referred to as being the employer of Akers.* (Tr. pp. 149, 157, 159.)

Consequently, we respectfully submit, that the plaintiff cannot recover upon the bond.

POINT II.

IF PLAINTIFF IS HELD TO BE AN EMPLOYER OF AKERS, SHE HAS NOT COMPLIED WITH THE TERMS OF THE BOND REQUIRING HER TO GIVE NOTICE OF ANY WRONGFUL DOING UPON THE PART OF AKERS.

The bond provides that notice of any loss covered thereby must be telegraphed to the defendant within ten

days after the discovery of the loss by the employer. (Tr. pp. 126-127.)

Akers began to default in his rent payments on January 1, 1924, and at all times thereafter remained in default, and it is shown on page 168 of the transcript, that on June 3, 1924, Akers and Wilkinson (the latter acting on behalf of plaintiff), took an inventory of the livestock then upon the ranch which showed only 198 head of neat cattle on the ranch, and further showed that Akers had sold to one Perez 296 cattle which Akers claimed he could buy back by reason of a verbal agreement.

But by the terms of his written agreement, as above mentioned, he was to keep upon the ranch at all times over 700 head of neat cattle.

It conclusively, then, appears that as early as June 3, 1924, (setting aside the default of Akers in the payment of his rent), plaintiff knew that Akers was wrongfully removing and had wrongfully removed cattle from the ranch.

This inventory is further supplemented by the evidence of Wilkinson himself, called as a witness for plaintiff on page 284 of the transcript, in which he sets forth that on June 3, 1924, he found much personal property, in his evidence enumerated, missing from the ranch and that such property was never returned by Akers to the ranch.

Consequently, then, as early as June 3, 1924, plaintiff must have known of Akers' wrongdoing, if there was such.

But the first notice ever given to defendant of this wrongdoing was the telegram of July 1, 1924 above mentioned and set out in full on page 171 of the transcript.

Consequently, then, plaintiff has not complied with the terms of the bond with regard to notice.

In the case of *New Amsterdam Casualty Co. v. Central etc. Ins. Co.*, 4 Fed. (2d) 203, in which the question of notice provided for by an insurance policy was being considered, the Court, in quoting from another decision, said at page 208:

> "The covenant of the plaintiff in the case under consideration was to immediately notify the surety company of any failure or inability of the contractor to construct and complete the building at the time and in the manner specified in the contract, and the question was not whether or not, although he failed to give the notice, he had exercised ordinary care to do so, *but whether or not he had actually given the notice immediately* upon the appearance of the known inability and failure of the contractor to perform his agreement." (Italics ours.)

And it was there held that judgment should have been for the surety company defendant for the failure to give the notice required by the policy.

In the case of *Los Angeles Athletic Club v. U. S. F. & G. Co.*, 41 Cal. App. 439, 447, which is perhaps the leading case heretofore raised in the Courts of this State upon the subject of notice to be given to a fidelity insurance carrier, the Court quoted from *California Savings Bank v. American Surety Co.*, 87 Fed. 118, at page 123, as follows:

> "The authorities cited by defendant, to the effect that the requirement as to notice of loss is a material provision, and must be strictly complied with in order to enable the employer to recover, are numerous."

Moreover, it appears from the uncontradicted evidence of Akers that after the plaintiff had been put upon notice

that, according to her contention, Akers was misapplying ranch property, she proceeded to other business transactions with him with a view to extricating him from his difficulties.

This was done without any notice whatever to the defendant.

As shown on page 230 of the transcript, a rescission of the original agreement between plaintiff and Akers was made by them on the 18th day of June, 1924.

This rescission recites that it was made in view of the fact that Akers and the corporation were in default in respect of their performance of their original agreement.

But prior to this date, as shown by Akers' testimony on pages 232-234 of the transcript, Akers and Mrs. Jones, or her representative, had a conference or conferences by which they were attempting to smooth over their differences.

We quote in full the testimony given upon those pages as follows:

> "Mr. Wilson. Q. Prior to the execution of this document of June 18, the rescission of the contract, did you have any conversation with Mr. McNab, or with Mrs. Jones, or with Mrs. Rodgers, relative to the financial situation, and your financial situation and your condition, and the general condition of the ranch?
>
> A. I did.
>
> Q. Will you state what occurred?
>
> A. The last conference we had was on June 13, at which time Mr. McNab recommended to Mrs. Rodgers and to Mrs. Jones, and to Mr. Jones, that I be given financial assistance from them, to help mature and harvest and carry on the crop. They agreed to do this. The amount involved was about $13,000. At Mr. McNab's suggestion, Mr. Jones and

Mrs. Jones and myself agreed to go to the ranch on Friday night, June 13, at which time they would place, they agreed to place to my account something over $7000 for immediate payments. I met Mrs. Jones and Mr. Jones at the Ferry Depot, before the train left, when they said they could not go to the ranch that night, but for me to go on to the ranch and they would go to the bank and wire the money to my bank in Lovelock that night. I went on to the ranch, and the next morning the telegram was at the bank, transferring the money to the ranch. But before the actual transfer was made by the telegraph company to the bank, there was another telegram cancelling the sending of the money. I communicated with Mr. McNab on the telephone, told him what had happened, and he said that he would take it up with Mr. Jones and let me know later. About two hours later I received a call from Mr. Jones, stating that he was leaving with Mr. Wilkinson that night for the ranch, and would place the money to my credit the next morning on his arrival. On his arrival he decided not to do it, with the result that I was unable to continue the ranch, and the rescission of the agreement was made.

Q. Was any authorization given you to draw checks on that account?

A. It was discussed over the telephone with the bank, that I would issue the pay-roll checks that were due that Saturday afternoon, and arrangement was made with the assistant manager in the bank that he would receive the deposit in the bank, either Sunday morning or Monday morning, to cover it.

Q. Did he receive the money there, the check?

A. No, the deposit was not made.

Q. Was not the deposit made and then withdrawn?

A. No, technically; the telegram came over to the ranch making a deposit, and at the same time the telegram came to the bank withdrawing it.

Q. In other words, the two telegrams were practically at the same time?

A. Yes.

Q. Now, at the time of your discussion with Mr. McNab of the necessity of money for outstanding

accounts, was anything said regarding the sale of any of the cattle which you had sold contrary to the lease, if you sold any contrary to the lease?

A. Yes, that was known at that time, and the report was made in regard to the cattle early in May by Mr. Wilkinson, and I was of the impression that he stated that he would send a telegram to Mr. McNab's office, but it was possibly Mr. Jones.

Q. When did you first have a discussion with Mr. McNab after the inventory was taken, regarding the financial situation of the ranch, and of the Reservation Land & Cattle Company, on June 3, 1924?

A. There were discussions prior to that.

Q. When?

A. In May, the latter part of May and early part of June, there were numerous discussions as to the financial conditions."

As above shown, the last conference was on June 13, 1924, and payment on the proposed check mentioned in evidence was stopped within a day or so thereafter.

It seems, then, to be true beyond a doubt, that the plaintiff knew upon that date that Akers was acting wrongfully, according to her theory of their relationship.

But no notice of any kind was given to the defendant until the telegram of July 1, 1924.

By Section 19 of our Civil Code, it is provided as follows:

> "Every person who has had actual knowledge of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Consequently, in view of the fact that the inventory, taken by the plaintiff's agent Wilkinson on June 3, 1924, was before the plaintiff on June 13, 1924, and that a day

or so after June 13, 1924, plaintiff stopped payment upon the check which she had proposed to give to Akers, it certainly cannot be claimed by plaintiff that she had no knowledge prior to June 13, 1924, of the fact that Akers was misapplying the ranch property.

With this knowledge at her hand, she now comes into Court claiming to be an "employer" of Akers under the terms of the bond.

It is a maxim of law incorporated into our Civil Code in Section 3521 that

"He who takes the benefit must bear the burden."

Consequently, if the plaintiff in the case at bar is to maintain her status as an employer of Akers under the terms of the bond, then she must show that she has strictly complied with the terms of the bond as to giving to defendant the required notice of the defalcation of Akers and also show, as his employer, her full compliance with the warranty provided in the employer's statement that at least in May of every year the accounts of Akers shall be examined and audited.

There is no pretense in the evidence that this was ever done by plaintiff or by anyone else.

POINT III.

IF PLAINTIFF WERE THE EMPLOYER OF AKERS, SHE HAS NOT COMPLIED WITH THE WARRANTIES CONTAINED IN THE STATEMENT OF THE EMPLOYER FOR THE BOND.

This statement is set out in full on pages 157-166 of the transcript and is signed by one, Bradford, as Vice President of the Reservation Land and Cattle Company as

employer, and, as shown upon page 163 of the transcript, one of the questions asked and answered is as follows:

> "Q. At what intervals will applicant's books, accounts, stocks and securities be inspected and audited and verified with funds on hand or in bank?
> A. At least once in every May of each year."

Akers, of course, was the applicant for the bond.

As shown by the evidence, no inspection or auditing of Akers' books or accounts was ever had until after his misapplication had been charged against the defendant, although such auditing should have taken place at least in May, 1924.

Here, then, was a warranty as shown by the application and statement, as signed by Bradford, which was in no respect complied with.

> "The all-sufficient, the conclusive, answer to the suggestion that the subject of the warranty or of the condition precedent is immaterial, and its breach without effect, is that the parties had the right to agree and they have contracted otherwise. The immateriality of a warranty or of a condition precedent made by the the agreement of the parties, and the innocuousness of a failure to perform it, do not nullify or mitigate the fatal effect of the failure prescribed by their contract."
>
> *National Surety Co. v. Long*, 125 Fed. 887, 891.

It is plain that the plaintiff either was or was not the employer of Akers.

If she were not such employer, then, clearly, she has no right to recover upon the bond.

If she were such an employer, then her right to recover has failed, because she has failed to give the notice required by the terms of the bond and has failed to comply

with this warranty providing that the books of Akers must be inspected and audited at least in May every year.

It is to be remembered that the bond provides, as shown on page 126 of the transcript, that the defendant surety is to be liable only for wrongful abstraction or wilful misapplication of money upon the part of the "employee" * * * "while in the performance of his duties in any position *in the service* of said employer." (Italics ours.)

The bond itself, therefore, marks out the condition upon which the surety is to be held liable.

> "A written statement made by employers to the obligor in a bond of indemnity against the dishonest acts of their employe to the effect that they will invariably apply certain checks to his action, which the parties expressly agree, by the statement itself and by the bond, shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and not of a representation, and a failure to comply with the promise it contains is fatal to an action upon the bond."
>
> *Rice v. Fidelity etc. Co.*, 103 Fed. 427, 432.

And in a case decided by this Court, it is said upon this subject of warranty:

> "It remains, therefore, unnecessary to characterize the bond in question, for the instrument between the bank and the surety company, as was expressly decided by this court in its former opinion, constituted a contract between the bank and the surety company, and 'if it made false material representations or warranties relied upon by defendant, the contract of suretyship, like any other induced by fraud, is subject to avoidance'."
>
> *Duke v. Fidelity & Deposit Co.*, 5 Fed. (2d) 305, 307.

And the Supreme Court of this State in the case of *Young v. Pacific Surety Co.*, 137 Cal. 596, in commenting upon Section 2608 of the Civil Code in a similar case, said at page 597:

> "In view of this express provision of the statute, it is evident that the questions and answers heretofore quoted from plaintiff's written application became a part of the bond or policy of indemnity, and consequently plaintiff is bound by the terms of the contract he made; and, having failed to substantially comply with its terms, his failure necessarily discharges the defendant from liability."
>
> *Hunt v. Casualty Co.*, 99 Fed. 242.

POINT IV.

THE STATUS OF AKERS HAVING BEEN CHANGED, WITHOUT DEFENDANT'S KNOWLEDGE, FROM THAT OF AN EMPLOYEE OF THE CORPORATION TO BEING THE CORPORATION ITSELF, RELIEVES DEFENDANT FROM LIABILITY UPON THE BOND.

There is nothing whatever in the evidence to show that the defendant had any knowledge whatever, of the agreement made between Akers, on the one part, and the plaintiff and Rodgers, on the other, at any time until more than one year after the agreement had been made and long after the alleged defalcation of Akers.

The evidence of Akers himself, called as a witness on behalf of plaintiff, and shown on pages 129-147 of the transcript, is positive to the effect that he neither exhibited this agreement to the defendant nor told the defendant of its existence at the time he applied for the bond, and defendant's witness, Dyer, as shown on pages 209-216 of the

transcript, is equally positive to the effect that neither he nor any other agent of the defendant surety had any knowledge of this agreement until one year after it had gone into effect.

But by the very terms of the agreement, plaintiff permitted Akers to form this corporation and become the corporation himself.

In other words, as the expression goes, it became by plaintiff's consent "a one man corporation."

But the defendant did not insure Akers or any corporation against his or its own fraud.

It insured *the corporation* against the defalcation of *Akers* as *an employee of the corporation.*

Consequently, when Akers became the corporation, it relieved the defendant from liability upon the bond as an insurer of the honesty of an employee of the corporation.

This same question arose in the case of *Farmers & Merchants Bank v. U. S. Fidelity etc. Co.*, in the Supreme Court of South Dakota, where it appeared that the insurer agreed to reimburse the bank for loss sustained by the fraud of an assistant cashier, the assistant cashier at that time owning five per cent of the capital stock of the bank. After the policy was given, the assistant cashier acquired a majority of the stock of the bank and became its cashier and thereby became the controlling factor of the bank and it was accordingly held in a suit upon the policy that the surety was not liable.

The Court, in speaking to the point, said:

> "Clearly, here was a situation not contemplated by the parties when the policy was issued, and not embraced by any fair and reasonable construction of its

terms. In absence of convincing evidence, it would be unreasonable to assume that the defendant would insure the conduct of any man thus situated. An undertaking insuring a person against his own dishonesty would be, to say the least, a novel and unusual contract. Had the plaintiff been a natural person engaged in the banking business, and this employe purchased the business or a controlling interest therein, certainly no one would contend he could maintain this action for his own benefit or that of the depositors. The *object of the undertaking was to insure an employer against the fraudulent acts of an employe, not to insure an employer against his own fraudulent acts.*" (Italics ours.)

28 *S. D.* 315, 321.

And in a dissenting opinion, written by one of the Justices who agreed that the judgment should be reversed, in the same case, it is said in speaking of the assistant cashier:

"When he was shown to be the cashier, and was thus removed from the supervision of any superior, such as would be over him when he was assistant cashier, there was a material change in the moral hazard, and the bond ceased to indemnity the respondent for his acts."

The defendant in the case at bar insured, according to the terms of the bond, the Reservation Land and Cattle Company against the defalcation of Akers.

When Akers became the company itself by acquiring all its capital stock, then, certainly, there became a material change in the hazard of the bond, for upon its face it was intended to insure only an employee and one whose accounts were to be regularly inspected and audited by his employer, to wit, the corporation.

The rule laid down in the case last above quoted is explicitly set forth as a principle in the article on Fidelity Insurance, 25 *Corpus Juris*, p. 1097.

POINT V.

THERE IS NO COMPETENT EVIDENCE TO SHOW THAT AKERS MISAPPLIED MONEYS AS FOUND BY THE COURT UPON THE REPORT OF THE REFEREE.

As above stated, after certain evidence had been taken in Court the case was referred to a Referee to take an account with the view to showing the misapplication upon the part of Akers.

Upon the hearing before the Referee, the witness Penney testified on behalf of the plaintiff, and the witness Janes, on behalf of the defendant, both as experts.

It is from the evidence of these two witnesses, or rather from the evidence of the witness Penney alone, for his conclusions were followed entirely by the Referee, that the report of the Referee showing a misapplication upon the part of Akers of moneys in the approximate sum of $33,000, was made and returned to the Court.

We shall frankly say to the Court that it is impossible for us to determine from the evidence of this witness how he was enabled to arrive at his conclusion.

It is to be remembered, as shown on page 15 of the transcript, that the burden of the charge against Akers is that he improperly removed from the ranch and applied to his own use personal property amounting as a whole in value to over $32,000., consisting, as shown by plaintiff's evidence, to great extent of livestock.

But, according to the evidence of Penney as an expert, he had nothing before him to show what livestock had been removed except the original agreement made between Akers and the plaintiff and Rodgers and the books and papers of the corporation and defendant's exhibit "C", to wit, the inventory taken by Akers and Wilkinson as shown on page 168 of the transcript.

Penney did not know, and, according to his evidence, did not pretend to know, what livestock were left by Akers upon the ranch after the taking of this inventory which is dated June 3, 1924, nor what other personal property or livestock was missing from the ranch after that date nor what was returned to the ranch by Akers.

Penney never visited the ranch, never inspected the personal property, and testified only according to written instruments.

We beg to quote to the Court a short part of Penney's testimony with the idea of showing that his entire evidence as to Akers' misapplication is based to such an extent upon hearsay and matters of which, in the nature of things, the witness could know nothing, that his conclusions as to the amount of the misapplication of funds by Akers must fall.

> "Q. At the first conversation you had with Mrs. Rodgers and Mrs. Jones, did they tell you they had a ranch and wanted an investigation made of the books?
>
> A. Words to that effect. I have done other work for them at times prior to this.
>
> Q. To the best of your knowledge, May 31, 1924, or prior to that time there was no examination of the books or attempt to make an examination, was there?
>
> A. Not as far as I know.
>
> Q. I show you Defendants' Exhibit 'C,' being an inventory executed and signed by Walter W. Akers

and E. M. Wilkinson. Did you ever see that before? Dated June 3, 1924?

A. I have seen a paper which I believe is a copy of this.

Q. Did you have that before you in making any of your accounts?

A. Yes.

Q. I show you plaintiff's Exhibit 2 and call your attention to Paragraph 19 thereof, which paragraph provides that: 'Except as in this paragraph otherwise agreed, the Lessee may, in his discretion, and in his own name, sell and encumber or sell or encumber,' etc., certain products of the ranch, but 'The Lessee shall not, however, sell or encumber but shall keep on said real property the following livestock now on said ranch, to wit.' Then it sets forth a certain number of cattle, horses, mules, etc. Will you state whether the horses, cattle and hogs, or any part of them, showing in the inventory in Exhibit 'C,' are the same livestock which is included in paragraph 19?

A. I don't know. Those animals are not marked or identified and neither are these, Mr. Wilson.

Q. In other words, then, you did not know whether there were livestock on the ranch in excess of the amount mentioned in paragraph 19 or not.

A. I did not take an inventory, Mr. Wilson.

Q. Then, you made the examination of these books and drew the conclusions you have drawn in your summary and did not take into consideration the livestock at all?

A. Yes, sir.

Q. Then how did you take into consideration the livestock unless you had in inventory of the livestock before you?

A. As I explained, I took into consideration, as far as comparing the quantities of livestock here with the quantities of livestock mentioned in the lease agreement, yes, sir. But I have no checking upon the situation at hand, because this inventory does not go ahead and complete it so one can tell. There are no values stated, as you can see.

Q. But the number of horses, mares, colts and cattle, etc., are all set forth in numbers, are they not?

A. In quantities, yes.

Q. You haven't any values set forth in paragraph 19?

A. No, sir.

Q. Merely quantities?

A. Right.

Q. So the inventory is taken along the same line, in that not values, but quantities are set forth as in paragraph 19?

A. In paragraph 19, yes, but not the exhibit attached to the agreement.

Q. Did you make any examination to ascertain the number of head of livestock or the quantity of livestock on the ranch at the time you took this account?

A. No.

Q. I will ask you again, Mr. Penney, whether or not in making up your summary, in making an examination of the books, you took at all into consideration the amount of livestock on the ranch?

A. You are asking a question about two different things that need not be entirely related.

Q. What do you mean by summary?

A. I mean this.

Q. What do you mean by summary?

The Commissioner. I think the question is quite clear: Whether or not you took into consideration what was on the ranch when you made the summary. Did you take into consideration whether there was anything there at all of value?

A. No; because the values are not stated.

Mr. Wilson. Q. Did you take into consideration the quantities of livestock?

A. I took it into consideration, but it didn't mean anything to me.

Q. I did not mean anything to you at all? Was about the quantity of livestock on the ranch at the time you made the examination of the books and the report that was provided in paragraph 19 to be kept on the ranch?

A. No, not as per this inventory.

Q. Did you check it?

The Commissioner. Did you go to the ranch at all?

The Witness. A. No, sir.

Mr. Wilson. Q. Did you have another inventory before you?

A. No.

Q. Than the one shown you, Defendants' Exhibit "C"?

The Commissioner. Q. You made the examination entirely from the books, did you not?

A. Yes, sir.

Q. Nothing else but the books?

A. That is all. I had the books and records and checks and vouchers and files and correspondence and contracts.

Q. Now, is there anything in the books which shows what was supposed to be on the ranch; shows the value of it?

A. No, sir. There is an exhibit attached to the lease agreement that has the opening inventory in detail. That is the last detailed inventory there is.

Mr. Wilson. Q. Did you take this inventory attached to the lease agreement into consideration in making your examination?

A. I took it into consideration, but it did not carry me any place."

(Tr. pp. 253-257.)

And to show just how uncertain the conclusions of Mr. Penney are as evidence, we beg to call the Court's attention to the combined statements of Mr. Penney, as witness for the plaintiff, and Mr. Janes, as witness for the defendant, shown on page 317 of the Transcript, where it appears that Penney's conclusion is that Akers misapplied approximately $33,000, and the conclusion of Janes is that Akers misapplied approximately $12,600.

It appears from the evidence of both these witnesses that they drew their conclusions as to their figures from the original agreement and from the books and papers of

the corporation and Akers without regard to what the actual conditions as to property were upon the ranch, and, consequently, we have this great difference in their respective conclusions.

The burden of proof was upon plaintiff to show the misapplication of Akers, and, certainly, it does not appear to be shown when Mr. Penney has reiterated that he knew nothing about the livestock or other property actually existing upon the ranch or returned to the ranch, except by reason of such knowledge as he received from the documents.

As above mentioned, the inventory which was submitted to Penney was made on June 3, 1924, but, according to his evidence, he did not begin his investigation which led to his conclusions until sometime after that date. (Tr. p. 253.)

The testimony of Wilkinson, plaintiff's witness, shown on pages 284-288 of the transcript, is to the effect that much personal property had been removed by Akers from the ranch, but it certainly does not show any sum approximating $30,000.

We respectfully submit, then, that the evidence produced by the plaintiff before the Referee is wholly insufficient to support a judgment against the defendant in the sum of $25,000, or in any other sum approximating that amount, and, upon the whole case, for the errors above specified, we respectfully submit that the judgment should be reversed.

Dated, San Francisco,
May 16, 1928.

JOHN RALPH WILSON,
Attorney for Plaintiff in Error.

Due service and receipt of a copy of the within is hereby admitted

this _____ *day of May, 1928.*

_____

_____

Attorneys for Defendant in Error.

No. 5366

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Plaintiff in Error,

vs.

MILLIE R. JONES,
Defendant in Error.

CERTIFICATE OF CLERK TO BRIEF ON BEHALF OF PLAINTIFF IN ERROR

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing printed twenty-four (24) pages, numbered from and including 1 to and including 24, to be a full, true and correct copy of the original printed Brief on Behalf of Plaintiff in Error, filed in above cause in my office on May 18, 1928, as the original thereof remains on file and appears of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, this 1st day of February, A. D. 1929.

(Seal) PAUL P. O'BRIEN, Clerk.

EXHIBIT B

No. 5366

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY (a corporation),
Plaintiff in Error,

vs

MILLIE R. JONES,
Defendant in Error.

CERTIFIED COPY OF BRIEF ON BEHALF OF DEFENDANT IN ERROR.

NAT SCHMULOWITZ,
ERNEST L. BRUNE,
United Bank and Trust Co. Building, San Francisco,
Attorneys for Defendant in Error.

Filed June 15, 1928.
Paul P. O'Brien, Clerk.

No. 5366

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY (a corporation),
Plaintiff in Error,

vs.

MILLIE R. JONES,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

On August 22, 1923, Millie R. Jones, the plaintiff below, and Elizabeth A. Rodgers, her mother, by a lease in writing (Tr. p. 88), leased to one Akers their ranch in Nevada, together with all the personal property thereon, which consisted, in part, of agricultural machinery and implements, horses, mules, sheep, hogs, cattle poultry, hay, grain and crops, the hay alone being over 5900 tons and all of said personal property having value, agreed upon by all said parties, of almost $100,000, as appears from the inventory which was made a part of the lease. The agreement, although actually executed on August 22, 1923, was expressly made and entered into as of July 1, 1923, and the term created by the lease began on July 1st.

The lease permitted the lessee, within certain limitations, in his own name to sell or encumber all hay, grain and other crops and products then upon the ranch or thereafter harvested and all the marketable cattle and livestock. But the lease provided, in respect of the proceeds of such sales or encumbrances that

> "The Lessee shall not disburse said proceeds or any part thereof otherwise than strictly for objects and purposes mentioned in this lease or under the powers herein expressly conferred upon him." (Tr. p. 97.)

The lease also provided that (Tr. p. 99)

> "The Lessee shall immediately open a full set of books of account as of July 1, 1923, and shall plainly and fully record therein in accurate detail all receipts and disbursements in respect of all and singular the Lessee's dealings and operations in respect of said Ranch, and the Lessee shall at all times during said term keep said books up to date."

The agreement also provided that said Akers should have the right to make one assignment thereof to a corporation to be formed by him for that purpose, provided, however, that said Akers should be a stockholder and director of said corporation and should be its manager for the ranch during the entire term, and, provided further, that the corporation should be a party to the assignment and should thereby expressly assume all the burdens of the agreement.

The lease further provided (Tr. p. 94) that

> "It is also a condition of this lease that the Lessee shall enter into the undertaking hereinafter provided for."

and that (Tr. p. 107)

> "Contemporaneously with the execution of this agreement, and as a condition precedent to this agreement becoming a binding contract on the part of the parties of the first part and to the party of the second part's acquiring any rights hereunder, the party of the second part shall, as principal, enter into and deliver to the parties of the first part an undertaking satisfactory in form to the parties of the first part, with sureties satisfactory to the parties of the first part, in the penal sum of $25,000.00, by which said undertaking said party of the second part as principal and said sureties shall agree to indemnify the parties of the first part and hold them harmless against all disbursements and applications of moneys or property by the party of the second part otherwise than strictly as herein agreed and said principal shall be bound by said undertaking both as a party to this agreement and as such active manager of said corporation assignee."

In order to comply with the aforementioned provisions in respect of the undertaking, Akers made application to Maryland Casualty Company, plaintiff in error, for the issuance by it of a fidelity insurance policy and, accordingly, plaintiff in error delivered to Akers and Akers delivered to Mrs. Jones and Mrs. Rodgers the fidelity insurance policy which forms the basis of this action.

This policy was dated August 23, 1923, (Tr. p. 125) and the findings of the trial court in respect thereof was (Tr. p. 63)

> "That on or about said 23d day of August, 1923, said Akers, for the purpose and with the object of performing and fulfilling said condition precedent in respect of said undertaking and of complying with the provision of said agreement

set forth in paragraph 9 of these findings, made application to defendant Maryland Casualty Company, hereinafter called Company, for the issuance by said Company of its fidelity insurance contract or policy sufficient in form, substance and all particulars to accomplish said purpose and object, to fulfill said condition precedent and to comply with said provision of said agreement; that thereupon and on or about said 23rd day of August, 1923, at the request of said Akers, in consideration of the sum or premium of $125 by said Akers to said Company then and there paid, *with full and complete knowledge of all the terms, covenants, conditions and provisions of said agreement, for the purpose and with the object of enabling said Akers to perform said condition precedent and to comply with said provision, with the intention and purpose that said Akers should and with the knowledge that said Akers would deliver the same to said lessors, and with the intention and purpose that said lessors, and each of them, would rely thereon as a full and complete compliance with said provision of said agreement*, said Company made, executed, signed, issued and delivered to said Akers its certain contract or policy of fidelity insurance in writing dated August 23, 1923, by the terms of which said contract or policy of fidelity insurance said Company promised and agreed that it would, within two (2) months after the receipt of satisfactory proofs of loss, reimburse said lessors for any loss, not exceeding $25,000, of money or other personal property which said lessors shall have sustained by reason of any acts or acts of wrongful abstraction or wilful misapplication on the part of said Akers either individually or as the manager of the corporation formed or to be formed by said Akers for the purpose of taking an assignment or transfer of said agreement; * * * that thereupon and on or about said 23d day of August, 1923, said Akers delivered to said lessors and said lessors accepted from said Akers said fidelity insurance

> contract or policy as a full and complete compliance with said provision of said agreement of lease and as the fulfillment of said condition precedent; that thereupon, and on or about said 23d day of August, 1923, said Akers entered upon said Ranch and took possession thereof under the terms of and as the lessee named in said agreement." (Italics ours.)

Thereafter, on September 1, 1923, the corporation above referred to was incorporated under the laws of Nevada with the corporate name of "Reservation Land & Cattle Company"; and on September 17, 1923, the lease was assigned to it.

The application for the bond was signed by Akers alone (Tr. p. 156) on August 22, 1923, the same date as of that of the lease, and the bond itself was issued the following day, August 23, 1923. (Tr. p. 128.)

The referee and the trial judge found that Mrs. Jones and Mrs. Rodgers had suffered a loss, covered by the bond, in excess of $32,000 and the trial court rendered judgment against Maryland Casualty Company for the amount of the bond, $25,000.

Addressing ourselves now to the points of the argument made in the brief filed on behalf of plaintiff in error,—

POINT I.

Opposing counsel argues that because the bond (Tr. p. 125) recites that "Whereas, Walter W. Akers, hereinafter called the employee, has been appointed to a position in the service of Reservation Land & Cattle Co. & Elizabeth A. Rodgers & Millie R. Jones, as their interests may appear, hereinafter called the em-

ployer" that therefore Mrs. Jones and Mrs. Rodgers were not protected by the terms of the bond, in respect of said loss, because they were not in fact employers of Akers. For the reasons now to be given, we maintain that the reference in the bond to the assured and risk as employer and employee was for convenience merely and was not, under the facts of this case, determinative of the protection afforded by the bond.

Akers alone applied for the bond. The application was signed by him alone. (Tr. p. 156.) Mrs. Rodgers and Mrs. Jones had nothing whatsoever to do with the application, had no dealings at all with the bonding company and did not come into any relation with the bonding company until the moment when the bond was delivered to them by Akers as a compliance with the conditions of the lease.

At the time when Akers signed his application (August 22, 1923) and when the bond was actually issued (August 23, 1923), the Reservation Land & Cattle Company had not come into existence and its "Employer's Statement" (Tr. pp. 157-166) was not made to the bonding company until September 17, 1923. With this employer's statement Mrs. Jones and Mrs. Rodgers had nothing to do. Moreover, in this very employer's statement the question appears (Tr. p. 159): "To whom is the bond to be made payable?", and the answer given by Reservation Land & Cattle Company is: "Reservation Land & Cattle Co., *Elizabeth A. Rodgers & Millie R. Jones.*" Did Akers have *three* employers,—a corporation and two women? Mrs.

Jones and Mrs. Rodgers are not referred to as employers in any part of either the application or the employer's statement furnished by Reservation Land & Cattle Company. In Akers' application the question appears (Tr. p. 149) "To whom is bond to be given?" Akers' answer is: "Reservation Land & Cattle Co. & Elizabeth A. Rodgers & Millie R. Jones, as their interests may appear."

On page 5 of his brief, opposing counsel makes the statement "the court erred in finding that plaintiff is entitled to recover upon the bond *as an employer* therein mentioned." (Italics ours.) The court made no such finding and, on the trial of the action, the trial judge said (Tr. p. 237):

> "I certainly do not think that it was intended by the bonding company that the bond should be on a contract between employer and employee. * * * The names of these women are written in this bond, Elizabeth A. Rodgers and Millie R. Jones, as their interest may appear. That is quite clear. If the bonding company intended that they were not going to issue a bond to protect Elizabeth A. Rodgers and Millie R. Jones they should have written it in the bond. That is my view of it."

To evade the consequences of inserting the names of Mrs. Rodgers and Mrs. Jones in this policy of fidelity insurance, D. E. Dyer, manager of the bond department of Maryland Casualty Company, who had this matter in charge, when called as a witness in behalf of the bonding company, testified that he did not know about the existence of the lease until about a year later when the claim was filed (Tr. p. 210); al-

though he admitted (Tr. p. 212) that when the application was made there was disclosed to him the fact that the bond was to be given to Reservation Land & Cattle Co., Elizabeth A. Rodgers and Millie R. Jones, as their interests may appear. But Akers, called as a witness in behalf of the bonding company, admitted, on cross-examination (Tr. p. 138), that he left a copy of the lease with the Maryland Casualty Company before the bond was issued, although he also testified (Tr. p. 143) that "I merely stated to the clerk in front of the counter that I would leave it there and come back and get it next day"! The trial judge did not believe this last testimony of Akers and gave the following expression of his opinion (Tr. pp. 235 to 237):

> "I am satisfied that the evidence clearly shows that this bond was given in accordance with the terms of the contract or lease. * * * If they did not know (if Maryland Casualty Company did not know of the existence of the lease) they should have known, because the bond itself shows that it was made to the Reservation Land & Cattle Company and Elizabeth A. Rodgers and Millie R. Jones, as their interests may appear. The evidence shows in that regard that when Mr. Akers, who appears first in this bond, took this matter up with the Maryland Casualty Company, he took with him this lease between himself and Elizabeth A. Rodgers and Millie R. Jones. It further shows that he took this lease to the company's office and left it there. Now, I cannot believe that the terms of that lease were not disclosed by him to the company or its agent. And it seems to me that under the facts of this case if that company did not know what was in that lease it was their duty to find out. I am of the opinion that the evidence shows quite clearly that this bond was given

> in accordance with the terms of this lease or contract. I do not think there is any doubt about that. * * * This bond was delivered to these women as the bond called for by this agreement. * * * If it (Maryland Casualty Company) did not have knowledge, it should have made inquiry and found out; but as I say, the language of this contract indicates to me that it must have known. The bond is made out to the Reservation Land & Cattle Company, and Elizabeth A. Rodgers and Millie R. Jones, as their interests may appear; it must have known about this agreement or lease or whatever you may call it. It seems to me that a bonding company entering into a bond of that kind should not come into court and set up such a defense as is set up here, which, in a case of this kind, appears to be in the nature of an evasion or an attempt to evade the contract that they have entered into on this bond. * * * It seems to me all of the facts surrounding this case show quite clearly that this bond was given in connection with the terms of this agreement and nothing else."

Mr. Dyer, who signed the bond, testified (Tr. p. 215) that the issuance of these fidelity bonds by his company was a routine business, but that sometimes, if it was a "*peculiar*" case he would handle it personally. It would therefore seem, as he handled this bond personally, that it was regarded by the bonding company as a "*peculiar*" case. Obviously, therefore, the bonding company was put on inquiry if, in fact, it did not know the terms of the lease.

Opposing counsel argues in his brief (p. 6) that Mrs. Jones and Mrs. Rodgers "were named in the bond to protect them until the formation of the corporation." So counsel concedes that for this brief period, at any rate, even though Mrs. Jones and Mrs.

Rodgers were *not* employers, they were nevertheless protected! However, that no such intention existed on the part of any one concerned is conclusively shown by the fact, amongst others, that when the corporation executed its "Employer's Statement" on September 17, 1923, it answered the question: "To whom is the bond to be made payable?", by the statement: "Reservation Land & Cattle Co., *Elizabeth A. Rodgers & Millie R. Jones.*"

It has been held over and over again that such bonds as the one involved in this action are policies of fidelity insurance and are governed by the principles of the law of insurance, and no cases need be cited to support this proposition, especially as opposing counsel admits in his brief (p. 9) that the bonding company here was "a fidelity insurance carrier" and argues (p. 16) that the Civil Code Sections dealing with warranties in insurance are applicable to situations like that in the case at bar. The bond in question being therefore clearly a policy of insurance insuring the fidelity of the risk, it is to be construed most strongly against the insurer. As said by the court in *Rankin v. Amazon Insurance Company*, 89 Cal. 203, 209,

> "Where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it, and is supposed to make it as potent as possible in his own favor."

In the case of *Southern Surety Company v. Austin*, decided by the Court of Civil Appeals of Texas on February 8th of this year (2 S. W. (2nd Series) 1,000), the court said:

"Contracts of this character, that is, guarantying the fidelity of employees and persons holding positions of trust, against embezzlement, defalcation, or misappropriation, have uniformly been construed as contracts of insurance, and subject to the rules applicable to insurance contracts generally, and not to those applying to ordinary sureties for accommodation. *A recital that the employee is 'principal' and that the company is 'surety' does not necessarily determine its character nor bring such contract under the rules governing principal and surety. The nature of the contract, considered as a whole, and the purpose for which it was executed, determine its character.*" (Italics ours.)

POINT II

Opposing counsel's heading here reads as follows:

"**IF PLAINTIFF IS HELD TO BE AN EMPLOYER OF AKERS, SHE HAS NOT COMPLIED WITH THE TERMS OF THE BOND REQUIRING HER TO GIVE NOTICE OF ANY WRONGFUL DOING UPON THE PART OF AKERS.**"

Although plaintiff and her mother were not employers of Akers, the bond required them to give a certain notice of loss, which they were bound to comply with. But it was not a "notice of any wrongful doing" that was required; it was a notice of *loss covered by the policy*. Counsel fails to establish any such loss, *or any loss*, prior to the losses whereof due notice was given and for which claim is made in this action.

In this connection, the only notice necessary on the part of Mrs. Jones and Mrs. Rodgers was the notice required by the bond itself (for they were not parties

to the application of Akers or to the "Employer's Statement" of Reservation Land & Cattle Company). The bond itself (Tr. p. 125) required "*that notice of any loss covered hereunder*" should be telegraphed and mailed to the home office of the bonding company within 10 days after discovery of the loss (proof of loss to be filed within 90 days thereafter).

Counsel states (brief, p. 8) that "as early as June 3, 1924 * * * plaintiff knew that Akers was wrongfully removing and had wrongfully removed cattle from the ranch." But this is not substantiated by the record.

Counsel attempts to show, in figures, a discrepancy between the number of cattle which Akers was required by the lease to keep on the ranch and the number of cattle shown by a certain inventry of June 3, 1924. But, on the one hand, counsel, in arriving at the number of cattle which were to be kept on the ranch, does not take into account that such of these cattle as were eight years old were excepted by the terms of the lease (Tr. p. 95), nor does he take into account that the lease (Tr. p. 95) allowed Akers, when he deemed it advisable, to sell any of the breeding animals, provided he replaced the same by other breeding stock. That is to say, counsel does not show, nor is there anything in the record from which he could show, that some of these cattle were not over eight years old or were not sold as breeding animals to be later replaced. Nor, on the other hand, can he establish that the number of cattle described on said inventory of June 3, 1924, were the only cattle on the

ranch, for Akers testified (Tr. p. 167) that this inventory was a "*partial*" inventory.

Moreover, while counsel, for the purposes of this part of his brief, definitely charges a wrongful removal of cattle, in another part of his brief (p. 20) he admits the lack of any foundation for such a charge, for he argues in these words: "But, according to the evidence of Penney as an expert, he had nothing before him to show what live stock had been removed except the original agreement made between Akers and the plaintiff and Rodgers and the books and papers of the corporation and defendant's exhibit 'C', to-wit, the inventory taken by Akers and Wilkinson as shown on page 168 of the transcript. Penney did not know, and, according to his evidence, did not pretend to know, what live stock were left by Akers upon the ranch after the taking of this inventory which is dated June 3, 1924, nor what other personal property or live stock was missing from the ranch after that date nor what was returned to the ranch by Akers."

The most that can be said, in respect of this subject of the removal of cattle by Akers, is that there had been a controversy between the lessors and Akers upon this point. This is reflected by the record when Akers, being asked whether certain cattle sold by him were part of the cattle which were required by the lease to be kept on the ranch, replied "I am not sure whether that was required or not", and it is also reflected by the following question asked of Akers by opposing counsel: "Was anything said regarding the

sale of any cattle which you had sold contrary to the lease, if you sold any contrary to the lease?"

That this whole subject of the sale of certain cattle by Akers was nothing more than a controversial subject is further shown by the fact that after it occurred, and notwithstanding that Akers was six months in arrears in respect of his rentals, Mrs. Jones and Mrs. Rodgers seriously considered rendering Akers financial assistance in his operation of the ranch and even went so far as to transfer by telegraph over $7,000 (Tr. p. 233) so that Akers could meet his payroll, although they immediately cancelled the transfer and later decided to commence a replevin action for the cattle in order to decide the issue whether Akers' sale of certain cattle was authorized under the lease or not. How or whether this replevin action was decided is not shown by the record.

It must therefore be perfectly clear that, in respect of the sale by Akers of certain cattle, no loss covered by the policy has been shown and therefore there was nothing about which to notify the bonding company, as far as these cattle were concerned.

Furthermore, as far as Mrs. Jones and Mrs. Rodgers are concerned, they treated such sale of the cattle as proper in their proof of loss filed with the bonding company, and the expert accountant, whose audit of Akers' books was accepted by the trial court as a correct statement of Akers' misapplication of moneys, treated the proceeds of this sale of cattle (shown as a cash receipt on Akers' books) like all other proceeds of Akers' sales of ranch products and considered only the improper and wrongful uses to which Akers ap-

plied such moneys. It may here also be remarked that opposing counsel in his brief (p. 19) says what is untrue when he makes the statement that "the burden of the charge against Akers is that he improperly removed from the ranch and applied to his own use personal property amounting as a whole in value to over $32,000, consisting, as shown by plaintiff's evidence, *to a great extent to livestock*". (Italics ours.) The fact is, as clearly shown by the evidence (Tr. pp. 220-227), that about $30,000 of the losses suffered through Akers by Mrs. Jones and Mrs. Rodgers were on account of *cash misapplied* and only about $3,000 of losses by reason of personal property misappropriated, and of this personal property *none* was live stock.

Another misstatement in opposing counsel's argument in this part of his brief (p. 8) must here be pointed out. In another abortive attempt to show that there had been a misappropriation of personal property by Akers as early as June 3, 1924, and that consequently Mrs. Jones and Mrs. Rodgers had failed to comply with the terms of the bond in not notifying the bonding company thereof, is found the following language of opposing counsel's argument (Brief, p. 8): "On June 3, 1924, he (Wilkinson, agent of lessors) found much personal property, in his evidence enumerated, missing from the ranch and that such property was never returned by Akers to the ranch", and counsel refers to page 284 of the Transcript for this evidence. However, the reading of the testimony of Wilkinson, known in that part of the Transcript (particularly pages 286-287), will reveal that Wilkin-

son was not testifying in respect of any personal property belonging to the ranch but was testifying in respect of personal property described in an alleged bill of sale from a concern by the name of Willa Vista Land Company to the Reservation Land & Cattle Company, offered in evidence by opposing counsel in order to show that Akers was entitled to a credit for the value of the personal property therein described. Wilkinson's testimony was that none of the personal property described in such bill of sale found its way upon the ranch of Mrs. Jones and Mrs. Rodgers and his testimony was not at all in respect of any property "missing from the ranch", and there was no question of any "returning" of any of this property to said ranch, for it was never on the ranch.

Obviously, therefore, opposing counsel has not established that there were, prior to the losses for which claim was made against the bonding company, any other losses covered by the policy of which the bonding company should have been notified. In respect of the above mentioned *sale of cattle* by Akers, clearly the record does not show, to use the words of the policy, "Any loss * * * sustained by reason of any act or acts of Fraud, Dishonesty, Forgery, Embezzlement, Wrongful Abstraction or Wilful Misapplication" on the part of Akers.

POINT III.

In this part of opposing counsel's brief it is argued that because the employer's statement *filed by Reservation Land & Cattle Company* contains the question:

> "At what intervals will applicant's books, accounts, stocks and securities be inspected and audited and verified with funds on hand or in bank?"

and the answer thereto:

> "At least once in every May of each year."

therefore this was a warranty which *Mrs. Rodgers* and *Mrs. Jones* were bound to comply with.

As there is no reference *in the bond* to such employer's statement, as neither Mrs. Rodgers nor Mrs. Jones were parties to such statement, and as there is no evidence that Mrs. Jones or Mrs. Rodgers ever heard of such employer's statement until it was offered in evidence on the trial, it is submitted without any further argument, that neither Mrs. Jones nor Mrs. Rodgers were at all bound by anything whatsoever that appears in such employer's statement. They complied with the terms of the bond itself and this was *all that was necessary.*

In this connection we desire to point out a misstatement in opposing counsel's brief (p. 5), where it is asserted that "The court erred in finding that the employer's statement was fulfilled by plaintiff according to its terms." The court made no such finding.

POINT IV.

The argument in this division of the brief filed on behalf of plaintiff in error is that, because Akers held all the stock of Reservation Land & Cattle Company and because the latter was therefore a "one-man corporation", therefore there was a material change in the hazard of the bond and that consequently Mrs. Jones and Mrs. Rodgers lost their right to look to the bonding company under the terms of the bond.

Whatever validity this argument might have if *Reservation Land & Cattle Company* had brought an action on the bond, it obviously has no effect upon the rights of Mrs. Jones or Mrs. Rodgers, who were afforded their own special protection by the express terms of the bond.

POINT V.

The trial judge and the referee both accepted as correct the testimony given, on behalf of plaintiff, by L. H. Jenney, the expert accountant who examined the books kept by Akers and in which were recorded all the transactions of Akers and/or Reservation Land & Cattle Company in Akers' operation of the ranch. A summary by Mr. Penney prepared from these books and records was admitted in evidence (Tr. p. 216) and shows that Akers' wilful misapplication of moneys amounted to approximately $20,000 and his wrongful abstraction of personal property amounted to approximately $3,000. (None of this personal property, it may here be recalled, being live stock.)

We must admire the candor of opposing counsel when he says in his brief (p. 19): "We shall frankly say to the court that it is impossible for us to determine from the evidence of this witness how he was enabled to arrive at his conclusions"; but it is not for us to lengthen this brief by enlightening opposing counsel when the matter was clear to the trial court. If there was anything erroneous in the conclusions of Mr. Penney, it was incumbent upon opposing counsel to point it out in his brief.

Even their own witness, Mr. Janes, also an expert accountant, agreed with the conclusions of Mr. Penney to the extent of $12,683.60 of misappropriations. (Tr. p. 293.)

In opposing counsel's cross-examination of Mr. Penney he sought repeatedly to nullify Mr. Penney's conclusions by the fact that inventories were not considered by Mr. Penney (because the inventory of June 3, 1924 was partial and moreover gave no valuation, as did the inventory attached to the lease). It was not necessary for Mr. Penney to consider the inventories, for he had all of Akers' own books and records showing in dollars and cents all receipts of property and money and all expenditures and disposals of ranch products. Mr. Penney made his examination entirely from the books, records, checks, vouchers, files, correspondence and contracts. (Tr. p. 256.) That was all that he needed for this purpose. Instead of pursuing the method of an examination of physical property upon the ranch at a certain time and physical property upon the ranch at a later time, Mr. Penney testified (Tr. p. 262) that he pursued the method of com-

piling the aforementioned summary by taking into consideration "cash receipts and disbursements and receipts and disposals of personal property other than cash", and that all these were shown from the books and records given to him by Akers for the purpose of such inquiry. Mr. Penney further testified (Tr. p. 267) that, in a case of this kind, the method he pursued in preparing said summary from the books and records is also the usual method in determining whether there had been misappropriations or misapplications as charged in this action.

The difference of approximately $20,000 between the figures arrived at by Mr. Penney and Mr. Janes, respectively, covered disbursements by Akers which so obviously were not for any of the specific purposes set forth in the lease as proper items to pay out of proceeds of sales of ranch products, that it is remarkable that Mr. Janes could seriously have considered them as proper. For example, Akers claimed a credit of $6,000 for salary and Mr. Janes was inclined to allow this. But there is absolutely nothing in the lease authorizing any such expenditure. Another credit which Mr. Janes was inclined to allow was the sum of $9,849.74, for personal property described and valued on an alleged bill of sale from one Willa Vista Land and Cattle Company to Reservation Land & Cattle Company; but, as Wilkinson testified on behalf of plaintiff, (Tr. pp. 286-288), none of this property found its way to the ranch, and *there is no testimony whatsoever that either Mrs. Jones or Mrs. Rodgers received any of said personal property.* Indeed, the alleged bill of sale did not purport to transfer any-

thing to them but purported to make the transfer, if any there ever was, to *Reservation Land & Cattle Company*. It would unnecessarily lengthen this brief to discuss in detail the other items of expenditures which Mr. Janes was inclined to allow Akers as an offset. They are given in detail in the record (Tr. pp. 305-317)and speak for themselves, inasmuch as opposing counsel does not seek himself to justify them in his brief. Nor is it necessary to narrate here the various admissions made by Mr. Janes, when cross-examined (Tr. pp. 294-299), tending to show the utter lack of justification for any of the off-sets he was inclined to allow.

As the record shows conclusively that the losses covered by the bond far exceeded the amount thereof, $25,000, it is submitted that the judgment below should be affirmed.

Dated, San Francisco,
June 9, 1928.

Respectfully submitted,
NAT SCHMULOWITZ,
ERNEST L. BRUNE,
Attorneys for Defendant in Error.

Due service and receipt of a copy of the within is hereby admitted

this _____ *day of June, 1928.*

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Attorneys for Plaintiff in Error.

No. 5366

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Plaintiff in Error,

vs.

MILLIE R. JONES,
Defendant in Error.

CERTIFICATE OF CLERK TO BRIEF ON BEHALF OF DEFENDANT IN ERROR.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing printed twenty-one (21) pages, numbered from and including 1 to and including 21, to be a full, true and correct copy of the original printed Brief on Behalf of Defendant in Error, filed in above cause in my office on June 15, 1928, as the original thereof remains on file and appears of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, this 6th day of February, A. D. 1929.

(Seal) PAUL P. O'BRIEN, Clerk.